No. 84-937

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IN THE

Supreme Court of the United States

October Term, 1984

WESLEY K. BELL, individually and d/b/a WES OUTDOOR ADVERTISING CO.,
Plaintiff-Appellant,

vs.

STATE OF NEW JERSEY, BRENDAN T. BYRNE, LOUIS J. GAMBACCINI, JOHN J. DEGNAN, DOROTHY ANDRES, RUSSELL H. MULLEN, CLARENCE PELL, VINCENT R. STOLOWSKI, WILLIAM DAVIDOWSKY, WILLIAM BURNHAM, JOSEPH CUNNINGHAM, ALAN SAGNER and NEW JERSEY DEPARTMENT OF TRANSPORTATION, an agency of the State of New Jersey,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JURISDICTIONAL STATEMENT

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December 12, 1984

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Questions Presented

1. May the State of New Jersey, consistently with article three section two and the First, Fifth and Fourteenth Amendment of the Constitution of the United States, do the following:

(a) take private property (billboards) without compensation, in violation of Public Law 91-646?

(b) take lands from the assessed owner possessing title by recorded deeds, without notice or compensation?

(c) use the Police Power to trespass on private lands and destroy the landowners State-licensed billboards without notice, compensation or hearings, on March, 1968, September 30th, 1983 and again, on October 25th, 1984?

(d) arbitrarily use its Department of Transportation to select one person's assets, along a thriving commercially zoned highway, while leaving other adjacent lands and businesses undisturbed?

(e) discriminate against plaintiff, even though he has become a "Displaced Person" under the Federal Uniform Relocation Act, Public Law 91-646, Title I, Section 101(6), Sec. 101(7), Sec. 202(a) and Sec. 205, resulting in the State of New Jersey's non-compliance with this Federal Act?

(f) use perjury, false affidavits and intentional FRAUD upon the Court, to deny plaintiff of a trial on the merits?

(g) conspire with defendants to use State Agencies and Police Powers, to put plaintiff out of business because of his outspoken political views and continual assertive leadership in the political arena?

(h) deny plaintiff a "trial on the merits" for any of his claims, even though each claim has been documented?

(i) remove eighteen billboards, on September 30th, 1983, in defiance of a Court Order, without notice to plaintiff-owner, in violation of a March 24th, 1969 Court Order, which granted plaintiff a forty-five day notice, should the State obtain a right of immediate possession?

(j) improperly redefine riparian lands and issue a deed from one State Agency to another, to remove plaintiffs billboards, which have legally existed on the site for twenty-eight years and then deny plaintiff a trial on the merits over the ownership?

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STATE OF NEW JERSEY, BRENDAN T. BYRNE, LOUIS J. GAMBACCINI, JOHN J. DEGNAN, DOROTHY ANDRES, RUSSELL H. MULLEN, CLARENCE PELL, VINCENT R. STOLOWSKI, WILLIAM DAVIDOWSKY, WILLIAM BURNHAM, JOSEPH CUNNINGHAM, ALAN SAGNER and NEW JERSEY DEPARTMENT OF TRANSPORTATION, an agency of the State of New Jersey,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JURISDICTIONAL STATEMENT

Jurisdiction

The subject of this case is "the Constitutionality of New Jersey officials, to confiscate real property without compensation, in violation of the Federal Uniform Relocation Act and the United States Constitution".

"The Constitutionality of New Jersey officials to enter onto Private Property, without any legal right of entry and destroy Private Property (billboard structures) without notice or warning, with the aid of Armed State Police".

"The Constitutionality of selecting plaintiffs assets and business interests, in their entirety, along a six mile section of a thriving Zoned Business Area, in a 'hop-scotch' manner, while leaving adjacent parcels untouched".

"The Constitutionality of denying plaintiff a trial on the merits, over the illegal confiscations and other related acts, by State Officials".

"The Constitutionality of State Officials to conspire to put plaintiff out of business, for political vengeance, in retaliation for his outspoken views".

The United States District Court (Orders on pages 25a*, 71a, 83a, 107a, 109a, and the United States Court of Appeals for the Third Circuit findings, on page 12a, are not in compliance with this court's previous decisions and are in violation under

United States Codes
28 U.S.C. 1257
28 U.S.C. 1291
28 U.S.C. 1331
28 U.S.C. 1343
42 U.S.C. 1983, 1985(3)-1986
and Public Law 91-646.

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* Page references from the Appendix to Jurisdictional Statement.

Jurisdiction of this Court to review paragraph number seven of the final judgment of the United States Court of Appeals, for the Third Circuit, copy on page 111a of the appendix, and the final order dismissing with prejudice, Appeliant's amended complaint, on September 28th, 1983, on page 84a and the interlocutory orders in this matter, on pages 25a, 71a, dated June 2nd, 1980 and December 17th, 1982, which granted defendant's motion and an order partially dismissing appellant's original complaint. A petition for re-hearing was filed on June 27th, 1984 and denied on July 24th, 1984, a copy on page 112a. A Notice of Appeal was filed, on July 30th, 1984, a copy on page 114a of the appendix and an extension to file briefs was extended to and including December 12th, 1984, a copy of which is set forth at 113a of the appendix.

Jurisdiction of this Court to review this matter is founded on the existence of a Federal question and amount in controversy and on the existence of a question arising under a particular statute. "The action arises under the Constitution of the United States,

Article 28 U.S.C. 1257
Article 28 U.S.C. 1291
Article 28 U.S.C. 1331
Article 28 U.S.C. 1343
Article 42 U.S.C. 1983-1985(3)-1986.

(The First, Fifth and Fourteenth Amendments and article three section two to the Constitution.)

The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

"The action also arises under the Public Law 91-646, as hereinafter more fully appears".

Constitutional and Statutory Provisions

Relevant portions of the First, Fifth and Fourteenth Amendments and article three section two to the United States Constitution and the Federal Uniform Relocation Act, are set forth in the appendix, commencing at (171a) and (140a).

Statement of the Case

A. Outdoor Advertising Business Since 1957

Plaintiff in this case, has been in the Outdoor Advertising Business, continuously since 1957, in Southern Ocean County, New Jersey.

Plaintiff was cited in 1960, as the youngest owner of an Outdoor Advertising Business in the United States, by "Signs of the Times", a national trade journal.

Prior to going into business for himself, plaintiff learned his trade from his father, who also had been in the Outdoor Advertising industry, for many years.

Plaintiff's sole source of revenue to support his family is derived from his Outdoor Advertising business.

B. Political Activities

Plaintiff has been active in the New Jersey Political system for many years and first ran for public office in 1964.

Plaintiff was elected to public office, as a member of the Stafford Township governing body in 1969, 1972, 1977, 1980 and 1982. During the years of 1972, 1974, 1975, 1980, 1981, 1982 and 1983, plaintiff served his community as Mayor.

C. Conspiring To Put Plaintiff Out Of Business

Defendants in this action, entered into a conspiracy to use State Agencies and Condemnation Proceedings to put plaintiff out of business.

Defendants held meetings to determine how and by what methods they would use, in manipulating the legal system, to take possession of all of plaintiff's assets, along a six mile stretch of a thriving, zoned business area on Route #72, between the Garden State Parkway and Long Beach Island. This section of highway derives 80% of plaintiff's business income.

D. Denials Of Advertising Permits

Plaintiff has continually sought advertising permits from State Agencies, but was denied by defendants, after they agreed, in writing, with local officials, that they would deny such permits for 'any reasons', to plaintiff.

E. Trespass And Destruction Without Right Of Access (Parcel L22B)

Defendants entered on plaintiff's properties, at one site and destroyed two licensed billboards, with State Police assistance, where the State had *no Condemnation Pending* and no legal right of access, in 1968 and again on September 30th, 1983 and a third time, they were thwarted by plaintiff and local police on October 25th, 1984 (See News Article page 117a; Police Reports pages 105a, 115a).

F. Took Possession Without Right Of Access

Defendants ordered plaintiff off of another parcel, (#L2R-31D) where the State had no right of access.

Defendants had entered into an agreement to purchase this parcel but refused to make payment to owner until plaintiff "signed-off" his rights on a permanent easement for an existing billboard.

Defendants knew of plaintiffs recorded permanent easement, yet they ordered the billboard removed claiming that it was on State-owned land, when it wasn't (See photo page 121a).

G. Took Possession Through Fraudulent Deed

Defendants carefully and Fraudulently re-drew riparian lands to include three of plaintiff's billboard sites and issued a deed from one State Agency to another. They then issued plaintiff a notice to get off or they would remove plaintiff's billboards, which had existed at the site, since 1958.

H. Condemnation Of Plaintiff's Interest Only

Defendants implemented a condemnation program to take only plaintiff's interest along a six mile section of a thriving commercially zoned highway and condemned only parcels where plaintiff applied for State Billboard Permits on parcels deeded to or leased by plaintiff, all recorded documents (See Map on page 127a).

I. Fraud Upon The Court

Defendants have used Fraud Upon the Court, with false affidavits, false swearing and also total misrepresentations by defendant's counsel (New Jersey Attorney General's Office).

These acts were committed intentionally, wrongfully and purposefully, to deny plaintiff a trial on the merits.

J. Federal Relocation Act Violations

The Federal Uniform Re-location Act requires defendants to compensate and assist plaintiff in 're-locating' his business interest (billboards) prior to any State taking of his properties or billboards.

Plaintiff originally applied for the assistance in 1970 and the defendants advised plaintiff by letter, that they would advise him when funds became available (See page 129a).

Defendants, in complete violation of the Act, failed to respond to plaintiff's request.

K. Condemnation Without Compensation

Defendants condemned some of plaintiff's properties and declared them "vacant" and therefore set no value whatsoever for the billboards or their leases, in violation of the Federal Uniform Re-Location Act and the U.S. Constitution.

Plaintiff's eighteen billboards were cut down and destroyed, on September 30th, 1983, without notice to plaintiff, to cut off $54,000.00 per year, of his annual income to force him into bankruptcy.

This destruction without 45 days notice, violates a 1969 Court Order (See page 1a).

L. Police Power Used To Violate Plaintiff's Protected Rights

Defendants use of the Police Powers, to enter onto private property and destroy plaintiff's business investments (eighteen billboards) as a direct means to cut off plaintiff's income and destroy him politically, financially, emotionally and to eliminate his future retirement security, after twenty-nine years of work to establish his business investments (See photos pages 119a to 125a).

Argument

The United States Court of Appeals for the Third Circuit erred in their paragraph number seven, of their opinion, when they "affirmed the judgment appealed".

The judgment appealed from, did not take into consideration, the current and continual violation of plaintiff-appellant's protected rights, that have never had a hearing or trial on the merits.

Plaintiff-Appellant's Brief, submitted and approved by the United States Third Circuit Court of Appeals, clearly related current State acts, under color of law, which are in violation of the United States Constitution.

The demolition of plaintiff-appellant's eighteen billboards, on September 30th, 1983, without notice, warning or compensation are a clear violation of plaintiff-appellant's Civil Rights and a violation of a March 24th, 1969 Court Order (See page 1a).

See exhibits on pages 117a, 119a, 121a, 123a, 125a, 127a, and State Police Report, page 105a, by officer in charge of protecting State Employees while they trespassed and destroyed plaintiff-appellant's property with no right of access at one site, and further illegally removed plaintiff-appellant's billboards on six other sites where the State officials condemned properties as vacant in violation of Public Law 91-646.

Plaintiff-appellant clearly qualifies as a "Displaced Person", under the Federal Uniform Re-Location Act, Public Law 91-646, Title I, Sec. 101(6), Sec. 202(a) and Sec. 205 of this Article, "as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate real property on which such person conducts a business operation".

Sec. 101(7) The term "*business*" means *any lawful activity* (D) solely for the purposes of section 202(a) of this Title, for assisting in the purchase, sale, resale,

manufacture, processing or marketing of products, commodities, personal property, or *services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.* Neither the Outdoor Advertising business generally nor the displays owned by Plaintiff-Appellant, in the Township of Stafford, constitute uses which are incompatible with other permitted uses of property, in the same areas. Plaintiff-Appellant's business is, in no way, inimical to the health, safety, morals or general welfare of the State's residents thereof. The State and Defendants taking of Plaintiff-Appellant's properties, to remove his advertising displays in a "Zoned and Commercially Thriving" business area, while leaving adjacent properties untouched, in violation of Section 201, of Public Law 91-646, and Section 301, (1), (2), (3), (4), (5) and (8), is an arbitrary, capricious, confiscatory, inconsistent, unreasonable, unequal, unwarranted and oppressive exercise of power, having no reasonable relationship to the public health, safety, welfare or morals or any other legitimate object of the police power. The total absence of any payment for Plaintiff-Appellant's billboard structures and the totally inadequate condemnation of his land, in this matter, are not commensurate with and have no reasonable relationship to the value of the billboards or the useful life or the income generated by the billboards. The Defendants, through their acts, purport to authorize the taking of property and the destruction and prohibition of an existing legitimate, useful, profitable and beneficial enterprise, without compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

At issue in this appeal, is the total (80%) "elimination" of this Appellant's business, which is a "means of communication and a media for the expression of ideas".

Plaintiff-Appellant is not alone in so characterizing outdoor advertising. Outdoor Advertising has been recognized by the United States Congress, as one of the nations separate and distinct "communications media" in the *Federal Campaign Communications Reform Act, 47 U.S.C. 801(1) (repealed 1974).* See also *Federal Election Campaign Act of 1971, 2 U.S.C. 431, 441(d)(1976).* Since this matter first began, in 1968, there has never been a trial, where Defendants could be questioned or cross-examined on the issues before the Court. Defendants obtained Court Orders to prevent Plaintiff-Appellant from taking depositions. Defendants have never testified nor have they ever answered interrogatories, yet Plaintiff-Appellant was required to answer extensive interrogatories, which he did, in good faith.

In 1970, *Plaintiff-Appellant applied for Re-Location Funds and assistance, as a Displaced Person (See letter from State agency, page 129a of appendix. The State took the position that:*

> *"as soon as the appropriate authorization to make payment has been given, Mr. Delaney and/or his representative will contact you".*

Plaintiff has never been contacted nor has he ever been offered any assistance, in this regard.

The Defendants have failed to comply with Section 205(c)(4) which requires them to "assist a displaced person displaced from his business operation, in obtaining and becoming established in a suitable replacement location" and Section 205(c)(5) "to supply information concerning Federal and State housing programs, disaster loan programs and *other* Federal or State programs offering assistance to displaced persons, and Section 205(c)(6) "provide other advisory services to displaced persons in order to minimize hardships to such persons in adjusting to relocation".

This Plaintiff-Appellant has endured "Maximum hardship" because of the mis-use of Federal Funds, for over 16 years. The State of New Jersey, because of its failure to comply with Public Law 91-646, is illegally holding Plaintiff-Appellant's properties, in violation of Sections 207 and 208 of Public Law 91-646.

Section 207 provides:

> "whenever real property is acquired by a State Agency and furnished as a required contribution incident to a Federal program or project, the Federal Agency having authority over the program or project *may not accept such property unless such State Agency has made all payments and provided all assistance and assurances as are required of a State Agency, by Section 210 and 305 of this Act.*"

It further states:

> "Such State Agency shall pay the cost of such requirements in the same manner and to the same extent as the real property acquired for such project, *except that in the case of any real property acquisition or displacement occurring prior to July 1st, 1972,* such Federal agency shall pay-*100 per centum* of the first $25,000 of the cost of providing such payments and assistance."

Section 208 provides:

> "whenever real property is acquired by a State Agency, at the request of a Federal Agency, for a Federal program or project, such an acquisition shall, for the purposes of this Act, be deemed an acquisition by the Federal Agency having authority over such program or project."

The State of New Jersey and the Defendants in this action, took possession of Plaintiff-Appellant's lands, by "Declaration of Taking", in 1969 and 1970, with 100% Federal Funds, in violation of Section 219(2)(a) of Public Law 91-646. Therefore, there is no question that Public

Law 91-646 applies in this case. The Defendants ultimate destruction of Plaintiff-Appellant's property (18 billboards) on September 30th, 1983, knowing full well that they had not provided any funding or compensation for the structures, clearly violates, beyond any doubt, Plaintiff-Appellant's protected rights and such acts constitute an unlawful exercise of Police Power, in that its objects have no reasonable relationship to the public health, safety, morals or welfare and such laws constitute an unreasonable, oppressive, confiscatory and unwarranted interference with property rights, in the manner in which such laws are being and will be applied and enforced, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Defendants purport to authorize the taking of private property (without compensation), for purely aesthetic purposes, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Defendants utilized 100% Federal Funding, under Public Law 89-285 (BILLBOARDS LEGITIMATE) Title I, Section 131 of Title 23 U.S. Code provides, under Control of Outdoor Advertising, as follows:

> (d) "*in order to promote advertising,* while remaining consistent with the purposes of this section, signs, displays and devices whose size, lighting and spacing, consistent with customary use, is to be determined by agreement between the several States and the Secretary, "*may be erected and maintained within six hundred and sixty feet to the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems, which are zoned industrial or commercial under authority of State law*".

Section 131 (g) provides:

> "just compensation shall be paid upon the removal of the following outdoor advertising signs, displays and devices—"

Section 131 (g)(3) provides:

> "those lawfully erected on or after January 1st, 1968". The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:
>
> A. the taking from the owner of such sign, display or device of all right, title, leasehold and interest in such sign, display or device; and
>
> B. the taking from the owner of the real property on which the sign, display or device is located, of the *right to erect and maintain such signs, displays and devices thereon.*"

State Defendants, ignoring these sections, choose to use TITLE III, Sec. 301, Section 319 of Title 23 to condemn, which is not intended for Zoned Business areas and is not intended for "BILLBOARD CONTROL".

TITLE IV, Section 401 of Public Law 89-285 provides:

> "Nothing in this Act or the amendments made by this Act, shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking, *without just compensation*, as provided in this Act."

The following case law supports Plaintiff-Appellant's position:

> "an alledged 'taking' in violation of U.S.C.A. Const. Amends 5 and 14, presents a "serious constitutional question" within district courts federal question jurisdiction". *Muskegon Theatres, Inc. v. City of Muskegon*, C.A.Mich. 1974, 507 F.2d 199.
>
> Where real property owners alleged, in action against city, that persons acting under the authority of the city, had destroyed plaintiff's building with a bulldozer and hauled away the remnants of the building together with certain assorted personal property and that plaintiffs had no notice whatsoever that city had intended to destroy their

building and had no opportunity for a hearing with respect thereto, complaint presented issue which could demand construction of U.S.C.A. Const.Amend. 14 and 1 and therefore, federal district court had subject matter jurisdiction of suit under this section. *Poage v. City of Rapid City*, D.C.S.C. 1977, 431 F.Supp. 240.

Suits brought to enforce federal statutory rights do arise under federal law for purposes of federal question jurisdiction even though the federal statute at issue may not explicitly provide a private right of action. *National Assn. for Community Development v. Hodgson*, D.C.D.C. 1973, 356 F.Supp. 1399.

Issue presented by suit to enjoin taking of plaintiffs farmlands by exercise of power of eminent domain, whether State Game Commission's taking of plaintiffs entire properties in fee rather than lesser portions thereof, was in bad faith presented federal question which was substantial. *Hillard v. Comm. of Pa. By and Through Penn. Game Comm.* D.C. Pa 1970, 308 F.Supp. 756.

Question of whether property was taken without due process or just compensation, constitutes a "federal question" within jurisdictional statute. *Jim Young Development Corp. v. State Highway Commission of Mo.*, D.C. Mo. 1972, 56 F.R.D. 38. *Donohoe Const. Co., Inc. v. Montgomery County Council*, C.A. Md. 1977, 567 F.2d 603 cert. denied 98 S.Ct. 3123, 438 U.S. 905, 57 L.Ed.2d 1148. *Perzanowski v. Slavio*, D.C. Conn. 1974, 369 F. Supp. 223.

The State of New Jersey in this case has taken Plaintiff's Private Property (BILLBOARDS) without providing any value of compensation and without notice or hearing and destroyed them under protection of armed, uniformed State Police in complete disregard of Plaintiff's Protected Rights. (*State Highway Department v. Branch*, 222 Ga. 770, 152, S.E. 2d 372 (1966)).

The Georgia Supreme Court in a strongly-worded opinion condemned the

> "taking of private property for public use, without just compensation." The Fourteenth Amendment (Code 1-815) which provides, "nor shall any State deprive any person of life, liberty, or property, without due process."

People, Department of Transportation v. Hadley Fruit Orchards, Inc., 130 Cal Rptr. 287, 59 Cal App. 3d 49 (1976).

> "the Court held that the State's removal of a billboard before payment of compensation was unconstitutional because it constituted a taking without prior payment of just compensation."

Klicker v. State, 293 Minn. 149, 197 N.W. 2d 434 (1972). The Court held that the plaintiffs must be given the opportunity to present evidence and develop the requisite facts necessary for a decision on the constitutional issue raised in their complaint (*Naegel Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W. 2d 206 (1968).

Schloss v. State Highway & Public Works Commission, 230 N.C. 489, 53 S.E. 2d 517 (1949).

In this case the Court indicated that

> "injunctive relief may be available to plaintiff against officials at such time as they attempt to enforce the ordinance and cause the removal of the outdoor advertising structures."

In *National Advertising Co. v. Utah State Road Commission*, 26 Utah 2d 132, 486 P.2d 383 (1971) the Court held

> "Defendants have not offered to pay just compensation for the removal of said sign, nor is there any evidence before the Court that there are funds available for payment of just compensation

> under these circumstances as required by Utah Code Annotated, Section 27-12-136.11 (1953) . . . and that there has been no procedure by the Commission to remove the sign and pay just compensation therefor as provided in the Highway Beautification Act." 496 P.2d at 385.

In *State Dept. of Highways v. Lamar Advertising Company of Louisiana, Inc.*, 304 S. 2d 779 (La. App 1974).

> "The Court held that the State could not require Billboards to be removed without payment for compensation "also *Whitman v. State Highway Commission of Missouri*, 400 I Supp 1050 (1975).

In *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963) the Supreme Court of Florida stated

> "that police power measures must not impose discriminatory restrictions on the use of private property."

In an Oregon case the Supreme Court ruled in *Webb v. State*, 217 Ore. 1, 340 P.2d 968 (1959)

> "So far as we are advised, there is nothing in the nature of signs used to advertise the business or products of a single commercial enterprise which the legislature could have considered more likely to interfere with "the safe and efficient use, and orderly appearance of the ***highways" than signs erected and maintained by different advertisers. There is no point of differentiation which makes immediate removal of the signs of one class expedient, desirable or necessary, but not signs of the other. It follows that the classification cannot be sustained and the statute, insofar as it ordains immediate removal of plaintiff's signs while permitting those which do not conform to different provisions of the statute to remain for five years, contravenes the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and is void." 340 P.2d at 973-974.

In *City of Buffalo v. Michael*, 16 N.Y. 2d 88, 262 N.Y.S. 2d 441, 209 N.E. 2d 776 (1965) the Court of Appeals of New York held

> "signs and billboards permanently affixed to land or buildings are compensable fixtures."

In *Richards-Dowdle Inc. v. State*, 24 App. Div. 2d 824, 264 N.Y.S. 2d 179 (1965)

> "In the course of its opinion, the Court held that (i)"[a]n appropriation of land unless qualified when made, is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures", 1d. at 801, (ii) "[t]he permanency of the attachment does not depend so much upon the degree of physical force with which the thing is attached as upon the motive and intention of the party attaching it", 1d. at 802, and (iii) "[i]t has been held that signs and billboards permanently affixed to land or buildings are compensable fixtures." 1d.

In a Colorado case the Supreme Court struck down a Zoning Amendment which granted unlimited powers which parallels the Defendant's actions in this appeal now before the Court.

In *General Outdoor Advertising Co. v. Goodman*, 128 Colo. 344, 262 P.2d 261 (1953) the Court held

> "On the face of the amended resolution it instantly appears that the county commissioners and the board of adjustment, without any set of standards or limitations, are permitted to act according to their particular liking for any reason or no reason at all. It would be difficult to find a more direct grant of arbitrary discretion and unlimited power than is here vested, and, of course, the freedom to use such power as it might relate to lawful enterprises and the uses of property, permits uncontrolled regulation and dictatorial powers of commercial and industrial enterprises in the area involved and therefore is

> repugnant to the Constitution of the United States and that of the State of Colorado. The unlimited power therefore apparent is double-barreled in that it provides the power to grant and equal power to take away or destroy. . ."

In the case now before this court defendants have permitted other land owners to errect and maintain permanent signs within the right-of-way and similarly situated to the Billboards removed by State employees at Defendant's direction in *Abdo v. City of Daytona Beach*, 147 So. 2d 598 (Fla. App. 1963) the Court held

> "The ordinance under attack on this appeal fails to define a pattern calculated to protect and preserve the beauty of the defendant city. It is so unreasonable and discriminatory as not to be a proper exercise of the police power. Paraphrasing the quoted expression of our Supreme Court in the Sunad case, we find insurmountable difficulty in attempting to equate the proposition that a sign advertising the price of gasoline, potatoes, or some other commodity, in such a way as to attract the attention of a motorist traveling on a highway to the establishment where the product is sold would be aesthetically inoffensive, but that a sign on that same highway and in the same general vicinity advertising the price of plaintiff's accommodations in his motel located thereon would shock refined senses or work a destruction of aesthetic values. The question arises as to what aesthetic and therefore legal distinction exists between a sign advertising motel rates, as prohibited by the ordinance here involved, and one which advertises, for example, swimming pool privileges, or free continental breakfast, or television in each room, etc., etc., which would be altogether permissible under the ordinance. For aught that appears, compliance with the ordinance could be effected by the unaesthetic expedient of throwing a bucket of paint over that part of the sign having to do with rates." 147 So.2d at 601-603.

In the case now before this Court the Defendants have selectively singled out this Plaintiff and have continuously enforced regulations and condemnations against him while leaving *all* others for fourteen years as if they did not exist.

In *Alabama Independent Service Station Assn. v. McDowell*, 242 Ala. 424, 6 So.2d 502 (1942) the Alabama Supreme Court held that unequal application of the law is unconstitutional.

The District Court's interlocatory order by Harold Ackerman, U.S.D.J., of June 2nd, 1980 was total error. The order basically dismissed the heart of the complaint and removed all money damages sought by Plaintiff-Appellant. (See *Lugar v. Edmondson Oil Co., Inc.*, 102 S.Ct. 2744 (1982)). This order dismissed with prejudice, strikes major issues raised without hearings or trial on the merits, in violation of Constitutional Law.

> "Some form of hearing is required before owner is finally deprived of a protected property interest". *U.S.C.A. Const. Amend* 14. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed.2d 265.

The District Court's orders by Anne E. Thompson, U.S.D.J., of September 28, 1983 and December 17, 1982 were in error. Judge Thompson failed to understand the complexities of Plaintiff-Appellant's claims and used the guide that the State could not issue Billboard Permits on State Lands. The reality of the matter is, that Plaintiff-Appellant has continually sought to challenge the States constitutionality of their selection and implementation of condemnation of Plaintiff-Appellant's properties and their failure to compensate for the Billboards on the sites condemned, as well as their refusal to issue permits, *prior* to any condemnation actions.

From the beginning, Plaintiff-Appellant has been unable to have a trial on the merits, as to why State Officials selected his lands and what legal rights they had in doing so.

> "allegations of property owners that actions of defendant in causing and permitting threat of condemnation to hang over plaintiff's property, amounted to taking or damaging of property, without due process of law, in violation of U.S.C.A. Const. Amends. 5 and 14, raised serious questions of fact and law which could not be decided on motion to dismiss for want of federal jurisdiction. *Boulevard Realty Corp. v. Providence Redevelopment Agency*, D.C.R.I. 1969, 308 F.Supp. 224.

The matter of this appeal is *not* a mere decision that the Court *may hear* but is a matter that the Court *must hear.*

> "Municipalities claimed abuse in its exercise of power of eminent domain with claimed result of taking private property without compensation, presents question of federal jurisdiction under U.S.C.A. Const. Amend. 14 and 1, which Federal Court *must* hear and determine." *Sayre v. U.S.D.C. Ohio*, 1967, 282 F.Supp. 175.

Judge Thompson, on pages 77a-78a, last paragraph of her opinion states that:

> "plaintiff does not appear to be challenging the adequacy of the administrative procedures available to him. Rather, the complaint appears to alledge that certain defendants have acted willfully, to deprive plaintiff of the safeguards available to him."

Judge Thompson, on page 78a of her opinion, recognizes that plaintiff is entitled to a hearing, yet states that:

> "it is unclear precisely what process has been afforded plaintiff."

Yet, Judge Thompson then dismissed that portion of paragraph six on *respondeat superior* doctrine, which does not apply regarding a conspiracy or on *res judicata* grounds, when no trial or hearing, on the merits, has been held. (See *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 (3rd. Cir. 1976).

Paragraph six clearly falls within jurisdictional grounds, even after the previous March 1978 order of George H. Barlow, U.S.D.J. The original complaint filed in 1977, set forth certain acts by defendants, prior to that filing.

The matter now before the Court, clearly sets forth many serious violations, up to and including October 25th, 1984 (See Beacon News Article and Photo, page 117a).

The District Court should not have dismissed any of Plaintiff-Appellant's claims, as they are valid and clearly set forth numerous violations of due process and U.S.C.A. 28, sections 1257, 1291, 1331, 1343 and 1983, as well as Public Law 91-646.

> "Statutory claim against State Commissioner of Social Services that state review procedures with respect to termination or reduction of Aid to Families with Dependant Children (AFDC) by local agencies, were in conflict with those prescribed by Department of Health, Education and Welfare (HEW) was "pendent" to constitutional claim against City Commissioner of Social Services, that procedures were in violation of due process and statutory claim was cognizeable in a federal court, irrespective of requirement of this section concerning jurisdictional amount." *Almenares v. Wyman*, C.A.N.Y. 1971, 453 F 2d 1075, cert denied 92 S.Ct. 962, 405 U.S. 944, 30 L.Ed. 2d 815.

Judge Thompson states, on page 79a of her opinion:

> "the court need not determine at this time, however, precisely what procedures must be afforded plaintiff under these circumstances. The State has in fact, offered, in January, 1978, a hearing concerning this matter. The state has accorded plaintiff an opportunity to submit documentation concerning his right to maintain or erect billboards, on the parcel in question."

The actual fact, is that Plaintiff, on cross-examination, showed the defendants his recorded permanent easements and deeds, at the January 31st, 1978 hearing, on the parcel referred to, by Judge Thompson. The recorded document was dated August 7th, 1972, in Book 3187, Page 1 of the County Clerks (Ocean County) records. (See *Foster v. City of Detroit, Michigan*, C.A.Mich. 1968, 405 F. 2d 138 motion denied 423 F. 2d 660).

The aforementioned recorded document was an easement agreement, which was presented to state officials on pages 127 and 128 of the transcript in the January 31st, 1978 hearing, which has never been concluded, after the first day.

Judge Thompson overlooked this important fact in her review because she incorrectly found that plaintiff failed to 'notice' State Defendants.

In her opinion, on page 90a, she states:

> "If, in the instant case, the State was aware of plaintiff's property interest in the parcel, it could not have moved to destroy the billboards, without affording plaintiff procedural due process. Similarly, if plaintiff had indicated to the state that he had an interest in the parcel, and consequently, was entitled to a permit for a billboard, the state could not deny the application for permits without affording plaintiff an appropriate hearing."

The State Defendants continued to refuse to issue Plaintiff Billboard Permits, since 1968, on Parcel #L2R-31 D. They then entered into an agreement to purchase and obtained a deed, dated December 5th, 1974 and recorded it on January 8th, 1975, in Book 3433, Page 225, from owners Egon Kahl and Mike Ackaway.

The State Defendants then refused to pay the owners for the property, until they could obtain a cancellation of Plaintiff's permanent easement, recorded on February 7th, 1972, in Book 3187, Page 1.

Subsequently, the State Defendants sent Plaintiff notices of removal, dated November 8th, 1977 and February 5th, 1980, and refused to issue advertising permits for this site.

Judge Thompson's incorrect findings state that "Defendants afforded plaintiff due process", thereby striking Plaintiff's loss of advertising claim, of $88,300.00 for parcel #L2R-31 D (See Loss of Advertising, page 137a).

Another important fact, which Judge Thompson overlooked in her review, was the State's refusal to present witnesses, at the pending hearing (State's letter of refusal to present witnesses, on March 9th, 1978) (See letter on page 135a).

Judge Thompson, in her final Order, filed September 28th, 1983, clearly demonstrates that she has been unable to clearly understand the issues solely because she has denied Plaintiff a trial or hearing on the merits.

Page 86a of Judge Thompson's Opinion, she claims that,

> "except parcel E 31B/L2R-31D ("L2R), Plaintiff's claim of ownership of the parcels is barred by the doctrine of *res judicata*".

The issue is not whether the State owns the lands now, but whether the taking of the lands was proper.

> "It is only where state officers have attempted to enforce an unconstitutional law or *to administer a valid law wrongfully*, that their acts are regarded as so disassociated from state for which they purport to act, that an action may be brought against them with respect to those acts without consent of state. *U.S.C.A. Const. Amend. II, Butz v. Economu*, U.S. Supreme Court No. 76-709, decided June 29th, 1978.

Judge Ackerman and Judge Thompson used *res judicata* as a ground for their dismissals even though Plaintiff-Appellant has not had a "trial or hearing on the merits".

The rule of *res judicata* provides that only when a case is "resolved on its merits" can a plaintiff be barred from bringing another suit involving the same cause of action.

> "A dismissal of the action with prejudice is not justifiable where the merits have not been adjudicated. And it is on the very essence of the 'judgment of non suit' that it does not serve as a bar to another action for the same cause." *Ross v. C.D. Mallory Corp.*, 37 A2d 766, 132 N.J.L. 1.
>
> "Statute, purpose of which was to save a party who had commenced or attempted to commence action within time limited by law within one year, where original action failed or otherwise on merits, is to be liberally construed." *Jacobs v. Haggerty*, 127 N.E.2d 775; Section 1123, General Code.
>
> "Arkansas statute permitting commencement of new suit within one year after non suit of action instituted within statutory period was intended to permit carrying on of same cause of action, and identity of cause of action, if challenged, necessarily must be established in second action; but it is not necessary that complaint in second action be a verbatim copy of first, and variance involving a

departure of mere procedural and not substantive aspect will not be fatal." *Cummings v. Greif Bros. Copperage Co.*, 202 F2d 824.

"Action is terminated in any other manner than by a voluntary discontinuance, a dismissal of complaint for neglect to prosecute action, or a final judgment upon merits, plaintiff may commence a new action for same cause." *Producers Releasing Corp De Cuba v. Pathe Industries*, 184 F2d 1021.

"A statute extending time for the institution of a new action or failure of the original action for reasons other than on the merits, is highly remedial, and should be liberally construed in furtherance of its purpose, to afford litigants a hearing on the merits." *C. Willard Norwood v. Walter H. Buffey*, 86 S.E.2d 809.

"A dismissal (not upon the merits) is a non suit." *Hotel Woodward Co. v. Ford Motor Co.*, 2nd Cir., 258 F 322, 325; *Scanlon v. Kansas City*, 325 Mo. 125, 145, 28 S.W.2d 84; *Wetmore v. Crouch*, 188 Mo. 647, 654; 87 S.W. 954; *Pear v. Graham*, 258 Mich. 161, 241 N.W. 865; *28 Words and Phrases, Nonsuit*, p. 749 *et seq.* and cases cited. (*Saubert v. Koster*, 408 N.Y.S.2d 828).

"Any suit which was not heard on its merits, may be brought again, within one year." *Giarrusso v. Brown & Sharpe*, 50 A2d 72; *Turner v. N.C. & St. L. Railway*, 285 S.W. 2d 122; *Carroll Hardwood Lumber Co. v. Stephenson*, 51 S.E. 2d 313; *Pinson v. Robertson*, 172 P2d 625; *McCary v. United States Fidelity and Guaranty Co.*, 110 F. Supp. 545; *Bollenbacher v. Society for Savings in City of Cleveland*, 76 N.E. 2d 866.

All previous decisions in this case have not addressed one of the most important issues, "FRAUD UPON THE COURT". Defendants and their attorneys have used the following, in this matter:

1. False Swearing, eleven times before a County Court Trial in a penalty action, against this Plaintiff-Appellant, in 1969.

2. Filing a False Affidavit with the N.J. Superior Court, Law Division, on May 28th, 1969, in opposition to Plaintiff-Appellant's suit challenging the State's condemnation actions.

3. Filing a Brief, with the United States Court of Appeals Third Circuit, on March 7th, 1984, knowing that critical information of Page Thirteen, Lines 3, 4, 5 and 6 were false, for the purpose of denying Plaintiff a "trial on the merits".

Plaintiff-Appellant's claims of Fraud Upon the Court, should be considered as particular facts were stated and copies of testimony, affidavits and supporting data were provided to the reviewing courts. *Woody v. Woody*, 261 A. 2d 486, 491. Judge Thompson's denial, on September 30, 1983, to restrain Defendants from destroying Plaintiff's billboards and 'Stay' the judgment issued on Sept. 28, 1983, "*which was not an order of removal*", was judicial error. Failure of the District Court to issue the stay allowed the State Defendants to complete the destruction of Plaintiff's billboards and then haul away their remains, thereby inflicting irreparable harm to Plaintiff.

> "granting of a stay would do no harm to the public interest" *Battle v. Anderson* (CA 10th, 1977) 563 F 2d 388. *White v. Sparkhill Realty Corp.* (1930) 280 U.S. 500, 50 S.Ct. 186, 74 L.Ed. 578. *Taylor v. Anderson* (1914) 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218.

No Viable Alternative

If this Court's finding is allowed to stand, Plaintiff-Appellant's protected rights are now, no more than a "form of words". *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.).

As the matter now stands, a future violation would appear to dictate no different outcome than the violation of the statute here. With or without evidence of bad faith by the state defendants, Plaintiff-Appellant would still be left with no current remedy nor future protection. Thus, tomorrow's illegal conduct would once again become yesterday's irremediable act. Our system of jurisprudence will not and should not abide such a result.

The concept that rights once recognized should be afforded some remedy is an ingrained one in our society. Often, where a statute has provided a right but no explicit remedy, this Court has been willing to fashion one. *E.g., Texas and N.O.R. Co. v. Brotherhood of Ry. and Steamship Clerks*, 281 U.S. 548 (1930); and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). And where the Court has been unable to find that a statute was intended to provide an individual remedy to a given Plaintiff, it has done so through a cause-of-action anaylsis. *Cort v. Ash*, 422 U.S. 66 (1975). It has not been the Court's practice to recognize an individual cause of action but nonetheless deny all meaningful relief. In fact, much of the analysis in past decisions has interchangeably referred to implied causes of action as implied remedies. See *e.g., Cannon v. University of Chicago*, 441 U.S. 677, 690 n.12, 698 (1979). This reflects the apparent assumption on the part of the Court that where there is a right and an individual cause of action, there is a remedy. Such an assumption is the heir, and somewhat limited modern expression, of the common law doctrine *ubi jus ibi remedium*. If a Plaintiff is properly before the Court and suffering a violation of a declared right, he shall have a remedy.

For the Court to withdraw from the Plaintiff-Appellant, all meaningful relief, is to utterly ignore the discretion of the Court system and the teachings of this Court regarding the assumption of a remedy.

America's most precious "protected right" is the right to run for and hold public office—it is the foundation of America.

Because Plaintiff has exercised this right and his right to freedom of speech, he now finds, after sixteen years, that "High-Handed" State Officials have been able to destroy his business interests, for political retaliation. This Court is Plaintiff's only recourse.

Conclusion

The questions presented by this Appeal, are substantial. Probable jurisdiction should be noted and the case set down for argument.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that the foregoing Jurisdictional Statement has been mailed to the opposing counsel, duly addressed to their offices, by Certified Mail.

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and to the Solicitor General, Department of Justice, Washington, D.C. 20530, with the proper postage affixed thereto, this 11th day of December, 1984.

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